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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Mr. Charlie Lewis Burr, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, and by hand delivery to Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301; and to Mr. Gregory Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301, on this 25 day of June, 1985.

David A. Davis

DAVID A. DAVIS

QUESTION PRESENTED

PAGE

QUESTION

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE. 10

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Burr v. State, 466 So.2d 1051 (Fla. 1985) is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on February 14, 1985, and petitioner's timely motion for rehearing was denied on April 26, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix I. This case involves the Eighth and Fourteenth Amendments to the United States Constitution; see e.g. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

STATEMENT OF THE CASE

An indictment returned by the Leon County, Florida, grand jury on October 29, 1981, charged Charlie Lewis Burr with first degree murder and robbery with a firearm (R-1-2). Burr proceeded to the guilt phase portion of his trial on June 8, 1982, before the Honorable Charles E. Miner.

The state presented its case, and following the court's denial of Burr's motion for a judgment of acquittal (T-1077), the state's key witness, Domita Williams, took the stand and recanted the testimony she had given for the state implicating Burr in the robbery/murder (T-1237-1238). Other witnesses testified for the defense, bolstering Williams' defense testimony. The state put on a case in rebuttal after which the court instructed the jury. The jury found Burr

guilty as charged on both counts (R-290-292).

At the sentencing phase of the trial, the state presented no additional evidence, but Burr presented several witnesses who said he was a good man and had been raised a Christian (T-435-451). After arguments and instructions, the jury returned a recommendation that Burr live (R-292). The court rejected the jury's recommendation and sentenced Burr to death (R-221-223). The court also sentenced Burr to 99 years in prison for the armed robbery and retained jurisdiction over the first third of that sentence (R-322).

In sentencing Burr to death, the court found in aggravation:

> 1. That the murder was committed during the course of a robbery.
>
> 2. That the murder was committed for the purpose of avoiding or preventing a lawful arrest.
>
> 3. That the murder was committed in a cold, calculated and premeditated manner without any moral or legal justification.

(R-311-320).

The court found nothing in mitigation (R-320).

On appeal the Florida Supreme Court, Burr argued, among other issues, that the jury's recommendation of life was based upon their doubt as to Burr's guilt and that such a basis for recommending life was reasonable, and the trial court should have followed it.

The Florida Supreme Court affirmed the trial court's judgment and sentence in an opinion filed on February 14, 1985. Burr v. State, 466 So.2d 1051 (Fla. 1985). Justices McDonald and Overton consented to the court's affirmance of the death sentence but did so without filing an opinion. The Supreme Court expressly rejected, as a matter of law, doubt as to guilt as a reasonable basis for recommending and imposing a life sentence:

> Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people can differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert.denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).

Id. at 1054.

Burr asked the Florida Supreme Court to rehear his case on this issue (See Appendix B) and pointed out to them several cases where that court had acknowledged that doubt as to guilt can be a legitimate basis for a life sentence. The court denied the motion without discussion (See Appendix C).

Burr now comes before this Honorable Court, asking it to consider whether a jury's life recommendation, based solely upon their doubt as to Burr's guilt, is a reasonable basis for imposing a life sentence.

STATEMENT OF THE FACTS

The facts in this case must be divided into two parts, The state's case and the defense' case, because Domita Williams, the state's key witness, recanted her prosecution version of what occurred on the day of the murder when she testified for the defense. As developed later, the fundamental ambiguity of her testimony, while insufficient to preclude the jury from returning a guilty verdict against Burr, was sufficient to raise some doubt of Burr's guilt sufficient to prevent the trial court from imposing death.

I. The state's case

By August 20, 1981, Domita Williams and Charlie Burr had been going together for two or three weeks and were talking of marriage (T-832,856). About 6:30 that morning Burr drove his car to Williams' house so he could take Williams

to work (T-832). Burr went inside and 15 or 20 minutes later, or shortly before 7:00 a.m. (T-833-834), the couple left the house and headed west on Highway 27 towards Tallahassee (T-833). About 7:00 a.m. or a little later (T-834) Burr pulled into the parking lot of a "Suwannee Swiftee" convenience store and waited while Williams went inside (T-834). About five to ten minutes later (T-850) she came out of the store with a cheeseburger and candy bar (T-834). Burr then got out of the car and went inside (T-835). Williams began eating her sandwich and only looked up when she heard a shot (T-836-837). Burr, smiling, got into the car and, seeing that Williams was crying, he asked her what was wrong (T-837). Williams saw the imprint of a gun in his pants (T-838).

Kim Miller, a customer, stopped at the Suwannee Swiftee about 7:00 a.m. and found the body of Steve Hardy, the clerk, lying over an open safe (T-866,871). Hardy had been shot behind the ear with a .22 caliber bullet (T-913); death was instantaneous (T-968). At 7:09 a.m. a dispatcher from the police department received Miller's telephone call reporting the incident (T-868). The police responded and within minutes they had cordoned off the area (T-874). They found, however, no fingerprints or hairs to tie Burr to the murder (T-886). $252.75 had been taken from the store (T-877).

About 8:00 a.m. (T-853) Williams arrived at the Worthington Park Apartments where Burr lived with a Katrina Jackson and her husband (T-918). Tammy Footman, a cousin of Williams, was also there. Williams entered the apartment alone (T-840). She acted nervous (T-1345) and asked if they had heard about the Suwannee Swiftee robbery (T-1357). Williams said that she had bought a cheeseburger there while Burr was inside, and on the way out she had heard a shot. She then got into the car and left (T-1357,957). Whether she left by herself or with Burr is uncertain (T-1358).

Burr came into the apartment a few minutes later (T-1346), and like Williams, he also acted differently (T-1358-1359). He began packing his bags and a short time later Williams and Burr left (T-1360).

At work sometime later, Williams asked her supervisor, Katherine Haygood, if she had heard about the robbery (T-1135). Although Williams could not recall what she had told Haygood (T-841), Haygood said Williams (who was calm) (T-1139) told her she had bought a soda inside the store about 8:00 or 8:30 that morning (T-1138), and while inside she had seen a young white man in bluejeans walking up and down the aisles. Williams then left the store but drove by a short while later and saw several police cars outside the store (T-1137). Although Haygood encouraged Williams to call the police (T-1138), Williams never did (T-842).

Burr picked up Williams after work, and the pair drove to Melbourne for the weekend (T-843). Burr took with him a box of .22 caliber guns which he sold in Melbourne (T-844). Despite what had happened, and although Williams claimed she was afraid of Burr (T-856), she did not look like she was afraid of him (T-960), they continued to act like a couple in love (T-960), and they were still talking of marriage (T-856). (Burr had never threatened Williams (T-863)).

The state also introduced as collateral crimes evidence, the testimony of three convenience clerks who claimed to have been robbed by Burr days after the Tallahassee robbery/murder. Burr was acquitted of committing one of those robberies in a trial subsequent to the one for the Tallahassee crimes.

II. The defense's case

After the state rested, the defense proffered the testimony of Domita Williams. Before the court then and later before the jury, Williams recanted the story she had given as the prosecution's star witness the day before. Williams said that August 20th was the first day she had to report for work

at the Sunland Training Center in Tallahassee. Because she did not have a car of her own, she drover her mother, Minnie Pompey, to work about 6:30 a.m. (T-1156) so that she could use her mother's car to go to her job. Pompey worked at a day care center about a 20 minute drive from where she lived, and that morning, Pompey "punched in" at 6:56 a.m. (T-1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after seven she started on the 20 minute trip back home (T-1158). As she returned home, she passed by the Suwannee Swiftee Store and saw several police cars there (T-1270). She was at work by 9:00 a.m. and about 5:00 or 6:00 p.m., she saw Burr and he stayed with her that evening (T-1271-1272). Pompey corroborated this story when she took the stand, and other witnesses also corroborated Williams' defense story.

A series of customers arrived at the Suwannee Swiftee on August 20, 1981, from shortly before 7:00 a.m. until approximately 7:10 a.m. All saw Steve Hardy alive.

Clarence Lowman arrived about 6:50 a.m. and left right after 7:00 a.m. (T-1078). As he was leaving, two cars drove up (T-1078). Vincent Prichard drove up around 7:00 a.m. As he left the store, he saw a black man wearing glasses walk towards the store, stop, then walk away (T-1082-1083). A tall, young man drove up as Prichard drove off (T-1083). Although Prichard drove away, two minutes later he drove past the store after he had picked up some men (T-1086). As he drove by he saw Kim Miller (the man who discovered Hardy's body), a friend of his, pull into the store (T-1086).

John Thompson pulled into the store about six minutes after seven (T-1096) and parked his car next to a blue Ford (T-1102). When he went inside, he saw Hardy acting unusual, as if he had something else on his mind (T-1106). Another man, not resembling Burr, stood at the back of the

store by the cooler (T-1109). He acted suspicious, as if he was just passing the time (T-1116).

Shortly after 7:00 a.m. Ruth Grant and her daughter Valerie were heading west toward Florida State University along Highway 27. They passed the Suwannee Swiftee and saw several police cars there (T-1194). A short time later, they saw an ambulance heading toward the Suwannee Swiftee and seconds later Domita Williams, a relative of theirs, passed them apparently heading home and past the Suwannee Swiftee (T-1195).

Immediately before the trial, he prosecutor called its witnesses into the office library and questioned them as a group about their individual testimonies (T-1282). When he asked Domita Williams about her story, she said she was not in the car with Burr on the morning of the murder.

> Q. Yesterday morning before you came to the courtroom here, where did you go?
>
> A. To Willie Meggs' office [Willie Meggs was the prosecutor in this case and held the title of an Assistant State Attorney].
>
> Q. Now, before going there, what was going through your mind? What were your intentions before coming there yesterday morning?
>
> A. Telling the truth.
>
> Q. You had decided to tell the truth?
>
> A. Right.
>
> Q. Can you tell the jury about what happened after you went to the State Attorney's Office?
>
> A. What happened? Okay. When we first got there, we were called into the library. I was in there. Katrina Jackson, Tami Footman and an officer and another witness, Darrel Footman, were in there, also. He questioned everybody. So, when he got around to me, I stated that I wasn't in the car the day of the murder.
>
> Q. You told who that?
>
> A. Willie Meggs.
>
> Q. You told him you were not in the car?
>
> A. Right

Q. Did you tell him that your previous statements were not correct?

A. I don't think I did, but I told him I wasn't in the car at all.

Q. What happened after that?

A. He told me to come in his office, which I did. Then I started telling him again that I wasn't in the car. He got bent all out of shape. He didn't want to hear it. He was mad, furious.

Q. He got a little upset?

A. Yes.

Q. What happened after that?

A. I still tried to tell the truth to him. Then he took me in Don Modesitt's office. I was going to tell the truth to him. Then he called me a liar and called me a bitch.

Q. Mr. Modesitt called you that? [Mr. Modesitt was the elected State Attorney for the Second Judicial Circuit of Florida.]

A. Right.

Q. Was he mad with you?

A. Yes, he was.

Q. Did he tell you and indicate to you what the consequences were if you gave two different types of testimony under oath?

A. Yes, he did.

Q. What did you think that meant?

A. I didn't know right then. I was scared.

Q. Did you tell them why didn't you come in here and tell the jury yesterday morning what you are telling them now? Didn't you stick by what you had planned to do that morning?

A. Because Modesitt said he was going to put me in jail, also. That was the second time somebody had told me that. I was afraid of going to jail.

Q. So, you changed your mind?[1]

A. Right.

---

[1]The prosecutor admitted that what Williams said about what happened on the morning of trial was true (T-1254-1255).

On appeal, the Florida Supreme Court characterized the State Attorney's threats as merely encouraging Williams to tell the truth. Yet, the Assistant State Attorney prosecuting the case never so characterized them:

> Q. Did Mr. Modesitt come there and talk to you?
>
> A. Yes, he did.
>
> Q. Did he apologize to you?
>
> A. Yes, but not the way I wanted to to hear it.
>
> Q. He didn't threaten you anymore, though, did he?
>
> A. He mentioned something about crime.

(T-1305) (emphasis supplied).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On direct appeal to the Florida Supreme Court, Burr raised eight issues. In one of those issues, Burr argued that, in light of Domita Williams' recantation at trial of her state version and the State Attorney's threats to make her change her story, Burr should be given a new trial. See Issue II Appendix D. The Florida Supreme Court rejected that argument characterizing Domita Williams' testimony as merely involving a matter of witness credibility which the jury was particularly suited to resolve. As to the threats by the prosecutor, the court said Domita Williams testified:

> That the State Attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth. Burr v. State, 466 So.2d 1051, 1053 (Fla. 1985).

On rehearing, Burr told the court that there was no evidence to support that statement, and to the contrary, the prosecutor admitted that the State Attorney had threatened Williams (See Appendix B). The Supreme Court denied the rehearing without issuing an opinion.

Burr also argued that the trial court erred in sentencing Burr to death, over the jury's recommendation of life, and by doing so, the trial court violated the Eighth and

Fourteenth Amendments of the United States Constitution and the principles established in Tedder v. State, 322 So.2d 908 (Fla. 1975). Relying upon the rationale of Tedder and Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) Burr argued that by ignoring the jury's life recommendation which was based solely upon the jury's doubt as to Burr's guilt, the trial court violated the Eighth and Fourteenth Amendments to the United States Constitution. That is, doubt as to guilt can be a reasonable basis for recommending life, as it reflects upon the character of the offense as permitted by Lockett, supra. The Florida Supreme Court rejected that argument, holding that a jury recommendation based upon such doubts was unreasonable.

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED

QUESTION

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE.

In this case, Domita Williams' testimony implicating Burr with the robbery/murder of the convenience store clerk was the critical testimony needed by the state to convict Burr. Without it, they could not have convicted him. Yet Domita Williams recanted her story when she testified the next day for the defense. She claimed that the prosecutor and especially his supervisor had threatened to jail her if she did not change her story, and significantly, the prosecutor admitted that his superior had made these threats. Also, Burr presented disinterested witnesses to corroborate Domita Williams' defense story that Burr in essence did not commit these crimes.

. . While the jury convicted Bates of the crimes, they recommended that he live. The only reason that they could have based this recommendation on was their residual doubt that Burr was guilty. Neither the trial court or the Florida Supreme Court found anything to mitigate a death sentence, and accordingly the court imposed and the Florida Supreme Court affirmed a sentence of death for Burr.

In affirming this sentence, the Florida Supreme Court rejected Burr's argument that any residual or lingering doubt the jury might have concerning Burr's guilt could serve to mitigate a death sentence. That court rejected, as a matter of law, doubt as to guilt as a legitimate sentencing consideration for the jury or judge to consider.

> Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. See, e.g., Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978).

Id. at 1054.

By so holding, the Florida Supreme Court has said, as a matter of law, that any evidence or argument presented during the penalty phase of the trial of a person convicted of first degree murder is irrelevant, and any life recommendation based upon such doubt is unreasonable. The further implication is that if the trial judge has any doubt as to defendant's

guilt, that belief is also irrelevant, and unless other mitigating evidence is present, the sentencer must impose a death sentence (presuming at least one aggravating factor is also present and there is no other mitigation). State v. Dixon, 283 So.2d 1 (Fla. 1972).

This holding clearly conflicts with this Court's holdings in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), and it presents a significant and important issue in the proper administration of Florida's Death Penalty Statute. Section 921.141, Florida Statutes (1981). It also has important ramifications for states which have enacted different procedures for imposing sentences of death. If the Florida Supreme Court is correct then no sentencer, whether it is the trial court or the jury, can consider doubt as to guilt as a mitigating factor or recommend or impose a life sentence based upon such a consideration.

In Lockett v. Ohio, supra, a plurality of this Court said:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (footnotes omitted).

A majority of this Court applied the Lockett holding in Eddings v. Oklahoma, supra. In that case, the trial court refused, as a matter of law, to consider Eddings' violent background as a mitigating factor. The Oklahoma Court of Criminal Appeals affirmed, saying the evidence was irrelevant because it did not tend to provide a legal excuse from criminal responsibility. Id. at 113. This Court rejected that limitation:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not

> by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 114-115 (footnotes omitted).

The Florida Supreme Court, in similar fashion, has said that doubt as to guilt is irrelevant. In contrast to Eddings which focused upon the defendant's character, this case focused upon the character of the offense. That is, doubt as to guilt, if a relevant consideration, reflects most strongly upon the characteristics of the offense and the fundamental ambiguity surrounding the facts so that the jury legitimately may want to provide a safety valve to preclude the real possibility of executing an innocent man.

Contrary to the Florida Supreme Court's holding, several justices of this Court have said or suggested that doubt as to guilt not only is relevant in considering sentencing a person to death, but it can be the preimminent reason to preclude imposition of the death sentence.

In Eddings, supra, Justice O'Connor, in her concurring opinion, said:

> Because sentences of death are "qualitatively different" from prison sentences, Woodson v. North Carolina, 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Id. at 118 (emphasis supplied).

In Spaziano v. Florida, 468 U.S.__, 82 L.Ed. 2d 340, 104 S.Ct.__ (1904) Justice Stevens, joined by Justices

Brennan and Marshall, said:

> While the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victim's body. It may well be that the jury was sufficiently convinced of petitioner's guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made, coupled with evidence indicating that petitioner had suffered serious head injuries when he was 20 years old which had induced a personality change, App 35 see also Spaziano v. State, 433 So.2d 508, 512 (Fla. 1983) (McDonald, J., dissenting), that the jury concluded that a sentence of death could not be morally justified in this case.

82 L.Ed.2d at 370-371, fn. 34.

Finally, in Heiney v. Florida, __U.S.__, 83 L.Ed.2d 237, __S.Ct.__ (1984) Justices Brennan and Marshall dissented from this Court's denial of certiorari. The issue presented in Heiney is precisely the same issue that is presented in this case.

> This Court, in Lockett and then more decisively in Eddings, held that any aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certinaly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death, is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

83 L.Ed.2d at 238 (emphasis in original).[2]

Consequently, the Florida Supreme Court has rejected, as a matter of law, what several members of this Court have said was a relevant sentencing consideration, doubt as to guilt.

Other federal courts have accepted doubt as to guilt as a reasonable basis for providing relief to a defendant. In Smith v. Balkcom, 660 F.2d 573 (CA 5 1981), the Fifth Circuit said:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt--this absence of absolute certainty--can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the jury entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Id. at 580-581 (emphasis in original).

Similarly, the Eleventh Circuit has repeatedly acknowledged

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[2] While this Court did not grant certiorari in Heiney, the reason may be attributed to the fact that the Florida Supreme Court did not address that issue in its opinion. Consequently, this Court may have been unsure of what the Florida Court would do if the issue was clearly and unambiguously presented to them. Whatever doubts this Court may have had in that regard, this case clearly indicates the Florida Supreme Court's position.

that doubt as to guilt can be a legitimate defense strategy during the penalty phase of a jury trial.

> Washington [Strickland v. Washington, __U.S.__, 80 L.Ed.2d 674, 104 S.Ct.__ (1984)] was a case of clear guilt based on confessions and pleas of guilt to three capital murder charges. King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and court that the ultimate penalty should not be exacted, lest a mistake may have been made.

King v. Strickland, Case No. 82-5306, CA 11, opinion filed December 3, 1984, 36 Cr.L.Rptr. 2251.

> The failure of counsel to use the statements to impeach the Johnsons may not only have affected the outcome of the quilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt."
>
> * * *
>
> In this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Smith v. Wainwright, 741 F.2d 1248, 1255 (CA 11 1984).

Finally, the Circuit Court for the District of Colombia has recognized the fear of executing innocent people:

> Without doubt, conviction of the wrong man is the greatest single injustice that can arise out of our system of criminal law. The fear that a completely innocent man may be executed or sent to the penitentiary constantly haunts not only those of us concerned with the law, but sensitive people generally. Thus the obligation to guard against this danger is obvious.

Gregory v. United States, 369 F.2d 185 (CA DC 1966).

At least one lower Florida appellate court has recognized that doubt as to guilt, at least in non-capital sentencing, can continue even after a jury has returned a guilty verdict:

> It is equally clear and convincing that to aggravate a sentence because the defendant shows "no remorse" is only acceptable if repugnant, odious and

> accompanied by a confession, either before or after the verdict. To cruelly torture a victim and admit pleasure at having done so is altogether different from professing innocence to the bitter end. How can one be expected to show remorse concurrently with the maintenance of innocence? Nor does a jury guilty verdict automatically extinguish the right to continued proclamation of blamelessness. Moreover, even if it did, defendants at sentencing could avoid aggravation by simply declaring their innocence and gratuitously expressing sorrow for the victim. Finally our supreme court has specifically ruled out lack of remorse as an aggravating factor in death penalty cases. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984).

Most significantly, in contexts other than that presented here, the Florida Supreme Court or members of that court has recognized doubt as to guilt as a legitimate consideration for defense strategy. In Alford v. State, 307 So.2d 433 (Fla. 1975) the Court said:

> Additionally, the evidence of the defendant's guilt in these crimes was particularly strong discounting the possibility of an "innocent" man being sentenced to die.

Id. at 445.

By implication, the Court would not have affirmed a death sentence if the possibility existed that an innocent man may be sentenced to die.

In dissent, Chief Justice Boyd in Riley v. State, 433 So.2d 976 (Fla. 1983) said:

> When this Court considered Riley's initial appeal and affirmed his convictions of the murders at the Sunset Bottling Company plant, where he was employed, I dissented on the ground that there waw a lack of legally sufficient, competent, substantial evidence presented at the trial to support the verdicts of guilt. Riley v. State, 366 So.2d 19, 22-23 (Fla. 1978) (Boyd, J., dissenting).
>
> When Riley's sentence of death was again before the Court on appeal following the Court's earlier remand for resentencing, I dissented from the affirmance of the sentence of death. Although I expressed no reasons for my position at that time, my preference for reducing the sentence to

> life imprisonment was based not on any principles of our capital felony sentencing law but on my continued view that Riley's guilt had not been adequately proven at his trial. Riley v. State, 413 So.2d 1173, 1175 (Fla.); (Boyd, J., dissenting), cert.denied, __ U.S. __, 103 S.Ct. 317, 74 L.Ed. 2d 294 (1982).

Clearly, although the Chief Justice could not convince the rest of the Court concerning the sufficiency of the evidence at the guilt phase, he nevertheless believed that its weakness should mitigate a death sentence.

In Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), Straight attacked the effectiveness of his trial counsel for failing to develop and present evidence of his unstable mental condition at the time of the murder and of his subsequent feelings of remorse for that crime. Rejecting this attack, the Florida Supreme Court noted that trial counsel's strategy during the sentencing phase was to maintain his innocence, just as he had maintained it during the guilt phase. The Court further said:

> However, a defendant through counsel may waive the opportunity to make such an inconsistent presentation on the question of sentence after maintaining his innocence at the guilt phase of the trial. For an attorney to take such a position on behalf of his client does not establish that representation was ineffective. Defense counsel viewed evidence of mitigating circumstances as fundamentally demanding to the integrity of his client's case. Therefore, we find this argument to be without merit.

For counsel not to be ineffective at the sentencing phase, the Court had to recognize that the weakness of the evidence was a legitimate defense strategy. If the Court did not so recognize, then Straight's attorney had to be ineffective because he argued in mitigation a theory not recognized by law.

Most disturbing, however, is the manner in which the Florida Supreme Court handled Richardson v. State, 437 So.2d 1091 (Fla. 1983). In that case, the only mitigation present was the doubt that Richardson committed the murder -

precisely the same issue raised here (See Appendix G, H). Richardson, like Burr, had several aggravating factors to justify imposition of death, and neither men had anything to mitigate these sentences other than the weakness of the evidence in their cases. Also, in both cases the jury returned an advisory verdict of life which the trial court in both cases ignored. Yet, on appeal, the Florida Supreme Court without any discussion reduced Richardson's death sentence to life while affirming Burr's sentence of death. They reduced Richardson's death sentence to life in prison despite the fact that in Buford v. State, 403 So.2d 943 (Fla. 1981), cert.denied, 455 U.S. 1163 (1982) the court had earlier rejected the issue Richardson and Burr raised:

> A defendant cannot be "a little bit guilt." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proven beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Id. at 953.

The court affirmed Burr's death sentence despite his reliance upon Richardson, and at oral argument both the state and counsel for Burr asked this Court to reconcile Burr with Richardson. It refused to do so, and relying upon Buford (which it could have used in Richardson, but did not), it rejected Burr's doubt as to guilt argument.

The Florida Supreme Court thus can do what it wants to do. If they want to reverse a death sentence, they simply do as they did in Richardson, and if they want to affirm, they cite Burr.

What makes the Richardson-Burr contradiction particularly galling is this Court's unwitting reliance upon Richardson as evidence of the Florida Supreme Court's strict adherence to the standard it adopted for evaluating the trial court's override of a jury recommendation of life.[3]

---

[3] See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

> We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. See Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Miller v. State, 332 So.2d 65 (Fla. 1976). Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.
>
> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case.

Spaziano v. Florida, 468 U.S.__, 82 L.Ed.2d 340, 356, 104 S.Ct.__ (1984).

This Court has seen nothing because the Florida Supreme Court has hidden its arbitrary action. It did not explain why it reduced Richardson's death sentence to life, yet when it affirmed Burr's death sentence on exactly the same issue as raised in Richardson, it cited Buford. No legal reasons exist for the distinction between Richardson and Burr, yet an obvious distinction does exist. Richardson gets life while Burr gets death. Yet this distinction is as arbitrary as being struck by lightening. Furman v. Georgia, 408 U.S. 238 (1972).

The drafters of the Model Penal Code similarly have recognized the relevance of doubt as to guilt as the legitimate mitigating factor. In fact, they believe this factor was so significant that if it was present, it precluded imposition of a death sentence.

> § 210.6 Sentence of Death for Murder; Further Proceedings to Determine Sentence
>
> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> * * *
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

Model Penal Code, Section 201.6(1) (proposed official draft, 1962).

Consequently, the Florida Supreme Court's decision that doubt as to guilt cannot be considered as relevant evidence in mitigation ignores what this Court said in Lockett and Eddings, supra, what several members of this Court have said, what other courts have said, what itself has said or done, and what other thinkers on the subject of capital punishment have recommended. The conflict is clear.

The facts in this case also are very clear. The state's case against Burr stands or falls upon Domita Williams. The state presented some corroborating evidence, of course, but without Williams' testimony implicating Burr, this evidence amounted to a small rubble of disconnected facts.

The defense story, of course, was immensely strengthened by Williams' recantation. What makes her defense version particularly compelling and hence more troublesome is the undenied threats made by the State Attorney on the day of trial for her to change her testimony. The prosecution never denied that his superior threatened Williams with jail.

> Q [By Mr. Meggs, the prosecutor] Did Mr. Modesitt come there and talk to you?
>
> A. Yes, he did.
>
> Q. Did he apologize to you?
>
> A. Yes, but not the way I wanted to hear it.
>
> Q. He didn't threaten you anymore, though, did he?
>
> A. He mentioned something about crime.

(T-1305) (emphasis supplied).

Also significant was the additional testimony of relatives and disinterested witnesses who made Williams'

prosecution story a virtual impossibility.

Thus, the facts here present a troubling case, and they certainly justify a jury's recommendation of life in light of Domita Williams' mutually exclusive statements and the evidence corroborating both versions.

This issue involves a substantial question in the administration of the states' various death penalty statutes. If doubt as to guilt is not a relevant consideration at sentencing, it will certainly significantly increase the likelihood that at sometime, somewhere, an innocent man will be executed. If doubt as to guilt is not a legitimate factor, what is the innocent man wrongly convicted to say? "I was drunk" when he wasn't. "I was crazy" when he isn't. "I am sorry" when he isn't because he has not done anything wrong.

The Florida Supreme Court's ruling in this case has significantly increased the likelihood that an innocent man may someday be executed by precluding, as a matter of law, the only viable defense to mitigate a sentence of death that he may have.

CONCLUSION

WHEREFORE, petitioner respectfully requests this Honorable Court to grant this petition for writ of certiorari, or, in the alternative, summarily reverse petitioner's death sentence for the reasons discussed in this petition.

Respectfully submitted,

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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STEVEN L. BOLOTIN
Assistant Public Defender

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLIE LEWIS BURR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

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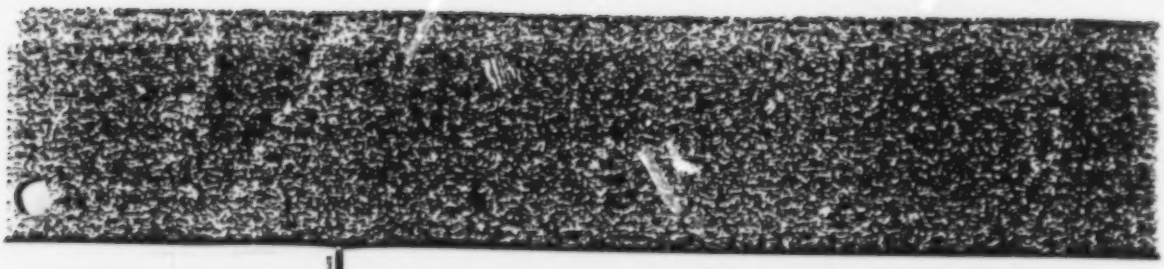
APPENDIX A



t front of the victim's chest, one
k, one to the abdomen, and two to
vrist. At some point during or
ly following the stabbing, Medi-
loose cloth gag in the victim's
According to the medical examin-
tim took ten to thirty minutes to
experienced considera[illegible]ain.
Preston v. State, 444 S[illegible]939
(victim's throat slashed, sur-
circumstances can support find-
as, atrocious, or cruel); *Peary v.*
2 So.2d 200 (Fla.1983) (stabbing
rt finding heinous, atrocious, or
aggravation). The record shows
na had an obsession for cars and
mendous desire to own his own
record supports the conclusion of
judge that he killed the victim,
new, to obtain her car. He later
[illegible]ll it to raise bond money for
ello. *Compare Middleton v.*
6 So.2d 548 (Fla.1982), *cert. de-*
U.S. ——, 103 S.Ct. 3573, 77
.413 (1983) (stealing victim's car
ls and selling pistols supports
r pecuniary gain).

has a behavorial problem. He
that he had been hospitalized for
roblems in Cuba. His actions ap-
e impulsive at times. The trial
naidered and weighed both the
and nonstatutory mitigating evi-
I found that Medina had no signif-
or criminal history. The trial
o found, however, that the non-
mitigating evidence was entitled
weight and that the aggravating
nces outweighed the mitigating
Compare Foster v. State, 369
(Fla.), *cert. denied*, 444 U.S. 885,
178, 62 L.Ed.2d 116 (1979) (death
affirmed for stabbing 'eath and
ven though defendant had exten-
ry of mental illness).

I that no reversible error occurred
[illegible]ial and that competent, sub-
[illegible]ce supports the convictions
nces. We therefore affirm those
s and sentences.

ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Charlie Lewis BURR, Appellant,

v.

STATE of Florida, Appellee.

No. 62365.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied April 26, 1985.

Defendant was convicted in the Circuit Court in and for Leon County, Charles E. Miner, Jr., J., of first-degree murder, and he appealed. The Supreme Court, Boyd, C.J., held that: (1) fact that State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to support conviction; (2) there was no evidence that State witness' testimony was made under coercion or duress; (3) evidence of collateral crimes was relevant to establish identity and intent; and (4) trial judge did not err in imposing death sentence over jury's recommendation of life imprisonment.

Affirmed.

Overton and McDonald, JJ., concurred in conviction, but dissented from sentence.

1. Grand Jury ⇐21

Defendant's showing that very few blacks had served as grand jury foremen in county did not constitute a prima facie case of racial discrimination in grand jury foreman selection.

2. Homicide ⇐253(1)

That State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to convict defendant of first-degree murder.

3. Criminal Law ⇐706(2)

Where witness, who testified against defendant only after being advised by State attorney of consequences of committing perjury and of importance of telling the truth, admitted on cross-examination that State attorney had neither threatened her nor behaved in a hostile manner, and where testimony implicating defendant was consistent with witness' original statements to her friends and police, witness' testimony was not the product of coercion or duress.

4. Criminal Law ⇐369.15, 371(4)

In prosecution for first-degree murder of store clerk during convenience store robbery, evidence of collateral crimes, namely, the testimony of other convenience store clerks to effect that defendant had robbed them, was relevant and admissible to establish identity and intent.

5. Criminal Law ⇐1037.1(2)

Defendant failed to preserve for appellate review issue of whether trial court erred by failing to control State's inflammatory and prejudicial argument, where no objections were made with respect to the comments.

6. Criminal Law ⇐723(4)

Prosecutor's statement that there were people who were scared and that defendant "executes" people was not so unduly inflammatory or prejudicial as to warrant mistrial.

7. Criminal Law ⇐665(4)

Where it was shown that rebuttal witness' testimony was not substantially different from what it would have been had she not heard testimony of witness she was rebutting, trial court did not abuse its discretion in allowing rebuttal witness to testify.

8. Homicide ⇐354

Evidence supported findings that murder of convenience store clerk during robbery was committed for purpose of avoid-

ing lawful arrest and in a cold, calculated and premeditated manner without pretense of any moral or legal justification, both aggravating circumstances used to support death sentence. West's F.S.A. § 921.-141(5)(e), (i).

9. Homicide ⇐354

Trial judge did not err in imposing death sentence over jury's recommendation of life in prosecution for first-degree murder of convenience store clerk during robbery where there were several aggravating circumstances and no mitigating circumstances and there was no reasonable basis for jury to recommend life.

David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Andrew Thomas, Asst. Atty. Gen., Tallahassee, for appellee.

BOYD, Chief Justice.

This case is before us on appeal of a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Charlie Burr was indicted for the first-degree murder of a store clerk during a robbery at a convenience store near Tallahassee. At the trial the state's key witness was Domita Williams who testified that she was with appellant the morning of the murder. She testified that they drove to the store where she bought a cheeseburger and candy bar and that when she returned to the car appellant entered the store. She said that she heard a shot and then appellant came out. According to her testimony, they then drove to an apartment where appellant was staying and she told Katrina Jackson and Tammy Footman about the incident. Upon being called as a witness, Katrina Jackson at first denied Williams had told her anything, but after being declared a hostile witness and upon cross-examination by the state, she corroborated Williams' testimony. The state then presented evidence of collateral crimes. Three convenience store clerks from Brevard County testified that appellant robbed and shot them in three separate incidents within a period of nineteen days after the murder charged in the instant case.

The defense called Domita Williams as its main witness. She recanted her earlier testimony and claimed that she was not with appellant the morning of the murder.

In rebuttal the state proffered Tammy Footman's testimony; she had heard the previous day's testimony where Williams had inculpated appellant, but had not heard Williams' recantation. Over appellant's objections, Footman was allowed to testify concerning Williams' statements to her to the effect that she was present at the murder. An investigator was also allowed to testify about Williams' statements to him, which were consistent with her original testimony. An interview of Williams, recorded on audiotape, was played for the jury.

The jury found appellant guilty of first-degree murder and robbery with a firearm. At the sentencing hearing the state presented no additional evidence. The defense presented several witnesses who testified that appellant was a good man and had been raised a Christian. The jury recommended a sentence of life imprisonment.

Notwithstanding the jury's recommendation of a life sentence, the trial judge sentenced appellant to death. In support of his sentence, the judge found as aggravating circumstances that the murder was committed during the course of a robbery, that it was committed to avoid or prevent a lawful arrest, and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The judge found nothing in mitigation.

[1] Appellant's first argument on appeal is that he was denied due process of law because the selection of grand jury foremen in Leon County is racially discriminatory. Appellant moved to dismiss the indictment, claiming he made a prima facie case of racial discrimination by showing

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Appellant moved to dismiss the
claiming he made a prima facie
racial discrimination by showing
that very few blacks have served as grand jury foremen in Leon County. We rejected a similar argument in *Andrews v. State*, 443 So.2d 78 (Fla.1983), and therefore hold that the court did not err in denying the motion to dismiss.

[2] Appellant's next argument is that there is insufficient competent evidence to support affirmance of his conviction and that in the interest of justice he should be granted a new trial. *See* Fla.R.App.P. 9.140(f). Appellant concedes that there is legally sufficient evidence, in the form of Ms. Williams' testimony, to support his conviction, but that such evidence is not competent since Ms. Williams recanted her earlier incriminating testimony. He argues that a witness cannot be considered credible when giving one story and incredible when giving another. The logical conclusion of appellant's argument is that juries must believe all or none of a particular witness's testimony. The fallacy of this conclusion is self-evident. Obviously, a witness can tell the truth about some matters and lie about others. In this case, to reach a verdict of guilty, the jury had to believe Ms. Williams' original testimony and disbelieve her recantation. It is not this Court's function to reweigh the evidence, but only to ensure its legal sufficiency. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The evidence was legally sufficient, and we do not find that the interests of justice require a new trial in this case.

[3] Appellant also argues that the conviction should be reversed in the interest of justice because Ms. Williams originally testified under duress. The record shows that on the day of the trial Ms. Williams indicated for the first time that her testimony would not implicate appellant. The state attorney then conferred with her and advised her of the consequences of committing perjury and of the importance of telling the truth. After this conversation, Ms. Williams testified as originally expected. During her recantation she explained that she had changed her mind and agreed to testify against appellant because the state attorney was furious with her and had threatened to put her in jail. However, on cross-examination by the state, Ms. Williams testified that the state attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth. This admission and the fact that her testimony implicating appellant was consistent with her original statements to her friends and the police belie appellant's contention that Ms. Williams' testimony was the product of coercion or duress.

[4] Appellant's next point on appeal is that the trial court erred by allowing into evidence the testimony of the other convenience store clerks to the effect that he had robbed them. Appellant contends that their testimony was not relevant to any issue of material fact. The state responds that such evidence was relevant to show identity, by showing the similarities between those shootings and this one, and to prove appellant had the intent to kill the victim. The state attempted to prove this latter element through the testimony of one of the other convenience store clerks who testified that appellant told him he was going to kill him.

We find that this evidence of collateral crimes was relevant to establish identity and intent and was therefore properly admitted. *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2)(a), Fla.Stat. (1981). Since this evidence did not become a major feature of appellant's trial, appellant was not improperly prejudiced by its admission. *See Williams v. State*, 117 So.2d 473 (Fla.1960).

[5] Appellant next argues that the court erred by failing to control the state's inflammatory and prejudicial argument. However, no objections were made with respect to the comments appellant now complains about, except for one of them. We therefore find that this point has not been properly preserved with respect to most of the comments appellant now claims

were improper. *See e.g. Steinhorst v. State*, 412 So.2d 332 (Fla.1982).

[6] The one comment appellant did object to was the prosecutor's statements that there were people who were scared in this case and that appellant "executes" people. The trial judge ruled that such statements were a fair comment upon the evidence and denied appellant's motion for a mistrial. We do not find these statements to have been so unduly inflammatory or prejudicial as to warrant a mistrial. *See Blair v. State*, 406 So.2d 1103 (Fla. 1981).

[7] Appellant's final argument with respect to the validity of his conviction is that the trial court erred in allowing a witness to testify in violation of the rule of sequestration. After Ms. Williams recanted and testified for the defense, the state called Tammy Footman as a rebuttal witness. Appellant objected on the grounds that Ms. Footman had been present during Ms. Williams' original testimony. The state proffered Ms. Footman's testimony, and the trial court ruled that only that part of her testimony that was consistent with her previous statement could be admitted. Because it was thus shown that Ms. Footman's testimony was not substantially different from what it would have been had she not heard Ms. Williams' testimony, the trial court did not abuse its discretion in allowing her to testify. *Steinhorst v. State; Dumas v. State*, 350 So.2d 464 (Fla. 1977).

[8] With respect to his sentence, appellant claims that the trial judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest and in finding that it was committed in a cold, calculated and premeditated manner without pretense of any moral or legal justification. *See* § 921.141(5)(e), (i), Fla.Stat. (1981). In support of his findings, the trial judge found that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. The judge also found that the position of the victim's body, indicating the victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution. We find no error in these findings.

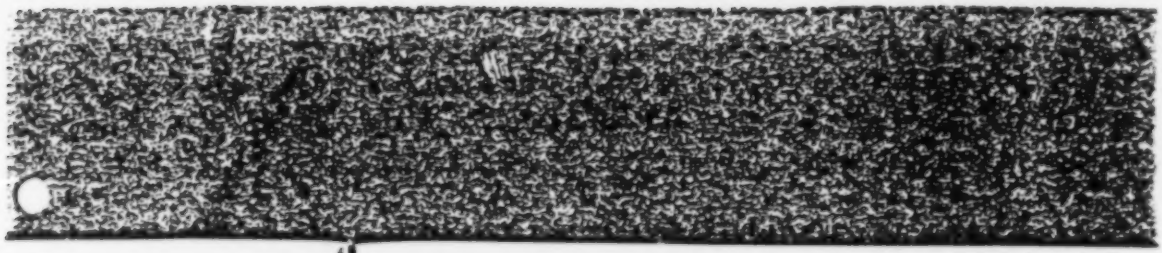
[9] Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. *See, e.g., Stevens v. State*, 419 So.2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); *Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

The aggravating circumstances adequately established and properly found by the sentencing court were:

(1) that the murder was committed in the course of a robbery;

(2) that the murder was committed for the purpose of avoiding arrest and prosecution;

(3) that the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.



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ate, 403 So.2d 943, 953 (Fla
rt. denied, 454 U.S. 1163, 102 S.C.
L.Ed.2d 319 (1982). There were
aggravating circumstances and no
g circumstances, so death was to
umed the appropriate penalty.
Dixon, 283 So.2d 1 (Fla.1973), *cert.*
416 U.S. 943, 94 S.Ct. 1950, 40
295 (1974). Moreover, there was
onable basis, discernible from the
for the jury to recommend life,
e the judge was justified in over-
he jury's recommendation. *See,*
ens v. State, 419 So.2d 1058 (Fla.
rt. denied, 459 U.S. 1228, 103 S.Ct.
L.Ed.2d 469 (1983); *Hoy v. State*,
d 826 (Fla.1977), *cert. denied*, 439
0, 99 S.Ct. 293, 58 L.Ed.2d 265

aggravating circumstances ade-
established and properly found by
encing court were:

that the murder was committed in
urse of a robbery;

that the murder was committed for
rpose of avoiding arrest and prose-

this the murder was committed in
calculated, and premeditated man-
ithout pretense of moral or legal
cation.

There were no mitigating circumstances. A sentence of death in this case is consistent with capital sentencing approved by this Court in similar cases.

The judgment of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, EHRLICH and SHAW, JJ., concur.

OVERTON and McDONALD, JJ., concur in the conviction, but dissent from the sentence.

In re ESTATE OF Holly E. GAINER, Deceased.

Carol GAINER, Individually and as Personal Representative of the Estate of Holly E. Gainer, Appellant,

v.

Dorothy DORAN and Mary Adams, Appellees.

No. 64,874.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied May 1, 1985.

Appeal was taken from judgment of the Circuit Court, Brevard County, Clarence T. Johnson, Jr., J., holding that testator's assets in federal savings and loan association account belonged to surviving joint holder. The District Court of Appeal, 443 So.2d 473, held that Savings Association Act unconstitutionally denied equal protection to beneficiaries, and personal representative appealed. The Supreme Court, Alderman, J., held that Savings Association Act's conclusive presumption that, absent fraud, joint accounts vest i survivor did not violate equal protectio

Decision of District Court of Appe reversed in part and cause remanded.

Ehrlich, J., filed dissenting opinio

1. Joint Tenancy ⇐6

Statute creating conclusive presumption that, absent fraud, joint accounts hel in federal savings and loan association would vest in survivor was intended t provide certainty as to nature of joint ac count with right of survivorship which i encompassed. West's F.S.A. § 665. 063(1)(a).

2. Joint Tenancy ⇐6

Legislature had authority to enac statute creating conclusive presumptio that, absent fraud, joint accounts in federa savings and loan associations would vest i survivor. West's F.S.A. § 665.063(1)(a).

3. Joint Tenancy ⇐2

For purposes of equal protection analysis, classifications established by Savings Association Act and banking code concerning entitlement to assets held in joint accounts were depositors in federal savings and loan associations on the one hand and depositors in state banks, rather than testamentary beneficiaries, on the other hand. F.S.1979, §§ 659.291, 665.271; West's F.S.A. § 665.063(1)(a).

4. Constitutional Law ⇐213.1(1)

Classification within context of equal protection clause is the grouping of things because they agree with one another in certain particulars and differ from other things in those particulars. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

5. Constitutional Law ⇐48(6)

Party who challenges classification within context of equal protection clause has burden of proving that it does not rest upon reasonable basis. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 2.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CHARLIE LEWIS BURR,	:	
Appellant,	:	
v.	:	CASE NO. 62,365
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

MOTION FOR REHEARING

Pursuant to Rule 9.330, Florida Rules of Appellate Procedure, the appellant, Charlie Burr, respectfully asks this Honorable Court to rehear his case as it has either overlooked or misapprehended several points of law or fact. As grounds for this motion, he says:

A. THE TIBBS ARGUMENT

On appeal, Burr argued that there was not substantial, competent evidence of Burr's guilt. Specifically, he argued that Domita Williams' testimony was not competent because she was not a competent witness. As the trial court admitted and this Court cannot deny, Williams lied on the witness stand (T-1265,1327). Significantly, she lied not just on portions of her story, as this Court's opinion inaccurately suggests, but her entire story was a lie. Thus, due to her complete inability to tell the truth, she was an incompetent witness. Bell v. State, 93 So.2d 575 (Fla. 1957). This Court overlooked this argument in its opinion, and Burr asks it to address it on rehearing.

B. THE STATE ATTORNEY'S THREATS

On page three and four of its opinion, this Court said:

> However, on cross-examination by the state, Ms. Williams testified that the State Attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth.

Counsel, however, cannot find any testimony that DON MODESITT, the State Attorney, had merely advised Domita Williams of the importance of telling the truth. To the contrary, DON MODESITT threatened her and the prosecutor, WILLIE MEGGS, never challenged that fact, and explicitly conceded it (T-1305). On cross-examination, what Domita Williams said was that WILLIE MEGGS, the prosecutor (not DON MODESITT, the State Attorney), had not threatened her (T-1305), and the most the prosecutor could get Williams to admit was that DON MODESITT had stopped threatening her.

> Q Did Mr. Modesitt come there and talk to you?
>
> A Yes, he did.
>
> Q Did he apologize to you?
>
> A Yes, but not the way I wanted to hear it.
>
> Q He didn't threaten you anymore, though, did he?
>
> A He mentioned something about crime.

(T-1305)(emphasis supplied).

The unrebutted evidence clearly shows that the State Attorney threatened Williams, and the prosecutor never challenged that fact. There was absolutely no evidence that DON MODESITT "merely emphasized the importance of telling the truth." To the contrary, what is absolutely clear and unrebutted is the fact that DON MODESITT called Domita Williams a liar and a bitch (T-1283) and was going to put her in jail (T-1284). This Court's statements about the State Attorney makes sense only if this Court has confused what Domita Williams said concerning WILLIE MEGGS as also applying to DON MODESITT. Williams, however, on direct (T-1283-1284) and cross-examination (T-1305) insisted that DON MODESITT had threatened her.

Moreover, this Court has overlooked the extensive and unchallenged testimony of the several customers of the

Suwannee Swifty who corroborated Domita Williams' defense testimony (T-1078,1086,1106,1109). Likewise, Katherine Haygood, Williams' work supervisor, essentially said Williams told her she did not know anything about the robbery (T-1137-1139). This Court has also overlooked the testimony of Williams' mother and her other relatives who said Williams could not have been with Burr at the time she said Burr committed the murder (T-1157,1195).

Burr, therefore, asks this Court to reconsider its opinion on this issue in light of the facts it has overlooked or misapprehended.

C. THE WILLIAMS RULE EVIDENCE

On page four of its opinion, this Court said:

> We find that this evidence of collateral crimes was relevant to establish identity and intent and was therefore properly admitted. (cites omitted.)

What this Court has misapprehended is:

1. Burr's intent and identity were not at issue in this trial. The prosecutor, in fact, did not believe he had to argue intent as it was so clear (T-1417). Moreover, defense counsel at trial never cross-examined Domita Williams about that elemen[illegible] (T-846-861), and on appeal, appellate counsel has not cha[illegible]nged the legitimacy of the trial court's findings regarding the aggravating factor that the murder was committed in a cold, calculated, and premeditated manner. Likewise, neither trial or appellate counsel challenged the identity of Burr as the killer. Consequently, this Court has overlooked Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974), Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974), and Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979) which hold that collateral crimes evidence is inadmissible to prove issues uncontested by the defense.

2. Likewise, this Court has overlooked Drake v. State, 400 So.2d 1217 (Fla. 1981) in which this Court said that the

collateral crimes evidence sought to be admitted must be so unusual or special as to point to the defendant as the perpetrator of the crime for which he is on trial. There are no pervasive similarities in this case with the Brevard County offenses, and what similarities exist here are so general that they do not meet the Drake test for admissibility. Moreover, the significant dissimilarities between the Brevard County robberies and this murder destroy any relevance that they had to this case.

More disturbing, however, is the fact that this Court has overlooked the acquittal in one of the Williams Rule cases used against Burr at his trial. Under Perkins v. State, 349 So.2d 161 (Fla. 1977), the state cannot use collateral crime evidence, for which a defendant has been acquitted, in a subsequent trial. In this case the acquittal was subsequent to the murder conviction in this case, yet Burr can perceive no meaningful distinction between this case and Perkins, and he asks this Court to reconsider its opinion concerning the admissibility of the Williams Rule evidence in this case.

D. THE AGGRAVATING FACTORS

On page five of its opinion this Court said:

> With respect to his sentence, appellant claims that the trial judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest and in finding that it was committed in a cold, calculated and premeditated manner without pretense of any moral or legal justification. See § 921.141(5)(e)(i), Fla.Stat. (1981). In support of his findings, the trial judge found that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. The judge also found that the position of the victim's body, indicating the victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution. We find no error in these findings.

Burr initially points out that this Court has overlooked the fact that the trial court made no findings of fact as to his conclusion that this murder was committed in a "cold, calculated, and premeditated manner..." but merely posed a rhetorical question.

> The murder of Steven Harty was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Of this, can there be any doubt?

(T-320).

By supplying the facts to support this finding that the trial court should have found, this Court has misapprehended its function. See Mann v. State, 420 So.2d 578 (Fla. 1982).

Moreover, this Court has overlooked the fact that the Williams Rule evidence which the trial court used to find that the murder was committed to avoid lawful arrest occurred after the murder. That is, Burr committed the murder before the other shootings in which no one died, a fact Burr clearly knew when he left at least one of the stores (T-993,1054).

Finally, although Burr raised the issue of the doubling of the aggravating factors "to avoid lawful arrest..." and "cold, calculated, and premeditated..." this Court overlooked treating that issue in its opinion.

E. DOUBT AS TO GUILT AS A REASONABLE BASIS FOR A LIFE RECOMMENDATION.

On page six of its opinion, this Court said:

> However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982).

What this Court has overlooked is that it or members of this Court have recognized, in other cases, that the weakness of the evidence can be a legitimate basis for a

life recommendation. In Alford v. State, 307 So.2d 433 (Fla. 1975) this Court said:

> Additionally, the evidence of the defendant's guilt in these crimes was particularly strong, discounting the possibility of an "innocent" man being sentenced to die.

Id. at 445.

By implication, this Court would not have affirmed a death sentence if the possibility existed that an innocent man may be sentenced to die.

In dissent, Chief Justice Boyd in Riley v. State, 433 So.2d 976 (Fla. 1983) said:

> When this Court considered Riley's initial appeal and affirmed his convictions of the murders at the Sunset Bottling Company plant, where he was employed, I dissented on the ground that there was a lack of legally sufficient, competent, substantial evidence presented at the trial to support the verdicts of guilt. Riley v. State, 366 So.2d 19, 22-23 (Fla. 1978) (Boyd, J., dissenting).
>
> When Riley's sentence of death was again before the Court on appeal following the Court's earlier remand for resentencing, I dissented from the affirmance of the sentence of death. Although I expressed no reasons for my position at that time, my preference for reducing the sentence to life imprisonment was based not on any principles of our capital felony sentencing law but on my continued view that Riley's guilt had not been adequately proven at his trial. Riley v. State, 413 So.2d 1173, 1175 (Fla.) (Boyd, J., dissenting), cert.denied, __U.S.__, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

Clearly, although the Chief Justice could not convince the rest of the Court concerning the sufficiency of the evidence at the guilt phase, he nevertheless believed that its weakness should mitigate a death sentence.

In Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), Straight attacked the effectiveness of his trial counsel for failing to develop and present evidence of his unstable mental condition at the time of the murder and his subsequent

feelings of remorse for that crime. Rejecting this attack, this Court noted that trial counsel's strategy during the sentencing phase was to maintain his innocence, just as he had maintained it during the guilt phase. This Court further said:

> However, a defendant through counsel may waive the opportunity to make such an inconsistent presentation on the question of sentence after maintaining his innocence at the guilt phase of the trial. For an attorney to take such a position on behalf of his client does not establish that representation was ineffective. Defense counsel viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case. Therefore, we find this argument to be without merit.

For counsel not to be ineffective at the sentencing phase, this Court had to recognize that the weakness of the evidence was a legitimate defense strategy. If this Court did not so recognize, then Straight's attorney had to be ineffective because he argued in mitigation a theory not recognized by law.

Finally, in his reply brief, Burr cited this Court's opinion in Richardson v. State, __So.2d__ (Fla. 1983) in which this Court reduced Richardson's death sentence to life imprisonment because of the weakness of the evidence of guilt. While this Court did not explicitly say this was the reason for doing so (in fact the opinion gives no reason for reducing the death sentence) the briefs filed in that case clearly demonstrated that the only basis for the jury's life recommendation was the weakness of the evidence as to Richardson's guilt. At oral argument in this case, counsel pointed this out to this Court and he received no challenge to that claim. Moreover, the state also at oral arguments acknowledged the problem presented by Richardson and asked this Court to resolve the conflict between Richardson and this case.

Consequently, this Court has overlooked Richardson, Riley, Alford, and Straight, and Burr respectfully asks this Court to reconcile its opinion in this case with the cases cited.

Charlie Burr, therefore, respectfully asks this Honorable Court to rehear his case.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, this 1st day of March, 1985.

DAVID A. DAVIS

APPENDIX C

RECEIVED
MAY 1 1985
DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

IN THE SUPREME COURT OF FLORIDA

FRIDAY, APRIL 26, 1985

CHARLIE LEWIS BURR, **

Appellant, ** CASE NO. 62,365

vs. ** Circuit Court Case No. 81-1831 (Leon County)

STATE OF FLORIDA, **

Appellee. **

Received
4-30-1985
Florida Attorney General

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD C.J., ALDERMAN, EHRLICH and SHAW, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Charles E. Miner, Jr., Judg

David A. Davis, Esquire
Gregory G. Costas, Esquire

APPENDIX D

84 6982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Mr. Charlie Lewis Burr, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, and by hand delivery to Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301; and to Mr. Gregory Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301, on this 14 day of June, 1985.

David A. Davis

DAVID A. DAVIS